Cheng as co-defendants in the proceeding. Since all these transfers were made by the appellant subsequent to the signing of the first agreement, the onus of proof would be on them to show that they were *bona fide* purchasers for value without notice of the first agreement on the authorities of *Bhup Narian Singh* v. *Gokhul Chan Mahton*[6] and *Ong Chat Peng & Ors.* v. *Valliappa Chettiar*[7]. The respondent, however, did not adopt this course of action. For the reasons given above we set aside that part of the order of the learned judge directing that the respondent should be entitled to one-half of the entire area of the said land now known as Lot 2080, Mukim Chabang Tiga, Kuala Trengganu held under K.R.M. 991. Since the appellant was no longer the registered owner of one-half share of the said land it was not possible for the court to order specific performance in accordance with the term of the first agreement. In our opinion, learned counsel for the respondent ought to have drawn the attention of the learned judge to the provisions of sections 13 and 18(3) of the Specific Relief Act 1950 (Revised 1974). Section 13 reads:–

"Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency."

And section 18(3) is as follows:–

"If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly."

In our judgment, either section 13 or section 18(3) may properly be invoked to the facts of this case. For this reason we allow the appeal of the interveners and substitute the undermentioned order in place of that made by the learned judge in the court below, viz:–

A declaration that the plaintiff/respondent was the beneficial owner of one-half share or 3338824/6677648 undivided shares in the said land now known as Lot 2080, Mukim Chabang Tiga, Kuala Trengganu held under K.R.M. 991 containing an area of 1.533 acres, more or less and ordering the defendant/appellant to transfer to the plaintiff/respondent all the 2224650/6677648 undivided shares now registered in her name within thirty days from date hereof and further ordering the defendant/appellant to pay compensation to the plaintiff/respondent is respect of the deficiency, viz. 1114174/6677648 undivided shares. It is further ordered that if the amount of compensation payable cannot be agreed upon between the parties it is directed it be assessed by a Senior Assistant Registrar. And if the defendant/appellant defaults in executing a registrable memorandum of transfer within the specified time it is ordered that the Senior Assistant Registrar attached to the High Court in Malaya at Kota Bahru, Kelantan, be empowered to sign the transfer on her behalf (*Loh Koon Moy & Anor.* v. *Zaibun Sa binti Syed Ahmad*[8] and Order 45 rule 8 of the Rules of the High Court 1980).

As regards costs it is ordered that the appellant shall pay to the respondent one-half of the taxed costs here and in the court below. The Court deposit to be paid to the respondent on account of taxed costs. We make no order with regard to the costs of the interveners in this appeal.

Order accordingly.

Solicitors: *H.S. Lim, Teo & Partners; Mehta & Co.*

ONG AH LONG v. DR. S. UNDERWOOD

[F.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah F.JJ.) April 25 & July 29, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 118 of 1982]

Tort – Negligent driving – Contributory negligence – Damages – Special damages to be pleaded – Damages for pain and suffering agreed – Damages for loss of future earnings – Loss of earning capacity – Assessment of damages – Principles applicable.

This was an appeal from the decision of the High Court at Ipoh which gave judgement for the respondent and awarded the sum of $2,017,440 in general and special damages due to the injuries suffered by him and caused by the negligent driving by the appellant of a motor van which grazed against the respondent's left arm while he was walking beside his car in a street in Ipoh.

Held: (1) the learned trial judge was correct in holding that there was no question of contributory negligence on the part of the respondent, that the appellant was wholly to blame for failing to pay attention to the presence of other road users and in consequence thereof failed to allow sufficient space between his van to enable the respondent

to pass safely. The learned judge applied the correct test in that the appellants had failed to prove that the respondent did not in his own interest take reasonable care of himself and contributed by that want of care to his injury;

(2) it is a well established principle that special damages in contrast to general damages have to be specifically pleaded and strictly proved. The learned trial judge in this case should not have allowed the amendment to claim loss of earnings 'still continuing on an unspecified rate to be assessed';

(3) in this case the learned judge has failed to make a specific finding of fact on the expert evidence. It is not clear whether he assessed the damages for loss of earnings on the basis of the respondent's inability to perform major plastic surgery or any form of plastic surgery at all. The learned judge had not taken proper advantage of having seen and heard the expert witnesses in order to assess the value, reliability and the impressiveness of the evidence on either side to justify his conclusion;

(4) the general principle is that an injured plaintiff is entitled to damages for the loss of earnings and profits which he has suffered by reason of his injuries up to the date of trial and for the loss of the prospective earnings and profits of which he is likely to be deprived in the future. There must be evidence on which the court can find that the plaintiff will suffer future loss of earnings, it cannot act on mere speculation. If there is no satisfactory evidence of future loss of earnings but the court is satisfied that the plaintiff has suffered a loss of earning capacity, it will award him damages for his loss of capacity as part of the general damages for disability and not as compensation for future loss of earnings. In this case the respondent has not shown that he has lost any future earnings but has only shown a diminished earnings capacity;

(5) in this case the respondent should be awarded $51,000 as part of general damages for loss of earning capacity and this together with the agreed damages of $5,000 for personal suffering would make the sum of $56,000 for general damages;

(6) in view of the long delay in which the case came up for trial, there will be 6% interest on general damages from the date of service of the writ instead of 8% as awarded and 3% interest on special damages from the date of the accident instead of 4%.

Cases referred to:

(1) *Lewis* v. *Denye* [1939] 1 All E.R. 310.
(2) *Davies* v. *Swan Motor Co.* [1949] 1 All E.R. 620.
(3) *Yee Hup Transport & Co. & Anor.* v. *Wong Kong* [1967] 2 M.L.J. 93.
(4) *Ilkiw* v. *Samuels* [1963] 1 W.L.R. 991; [1963] 2 All E.R. 879.
(5) *Murtadza bin Mohamad Hassan* v. *Chong Swee Pian* [1980] 1 M.L.J. 216.
(6) *Sam Wun Hoong* v. *Kader Ibramsah* [1981] 1 M.L.J. 295.
(7) *Domsalla* v. *Barr* [1969] 1 W.L.R. 630, 635.
(8) *Phillips* v. *Phillips* (1878) 4 Q.B.D. 127, 139.
(9) *Perestrello E. Companhia Limitada* v. *United Paint Co. Ltd.* [1969] 3 All E.R. 479.
(10) *Ratcliffe* v. *Evans* [1892] 2 Q.B.D. 524, 529.
(11) *Lim Eng Kay* v. *Jaafar bin Mohd. Said* [1982] 2 M.L.J. 156.
(12) *Mat Jusoh bin Daud* v. *Syarikat Jaya Seberang Takir Sdn. Bhd.* [1982] 2 M.L.J. 71.
(13) *British Transport Commission* v. *Gourley* [1956] A.C. 185, 206.
(14) *Joyce* v. *Yeomans* [1981] 1 W.L.R. 549.
(15) *Lucock* v. *Mildren and Chamberlain* [1962] 2 Lloyd's Rep. 325.
(16) *Billingham* v. *Hughes* [1949] 1 K.B. 643.
(17) *United Plywood and Sawmill Ltd.* v. *Lock Ngan Loi* [1970] 2 M.L.J. 237.
(18) *Ashcroft* v. *Curtin* [1971] 1 W.L.R. 1731.
(19) *Rasidin bin Partorjo* v. *Frederick Kiai* [1976] 2 M.L.J. 214.
(20) *Multar* v. *Lim Kim Chet* [1982] 1 M.L.J. 184.
(21) *Fairley* v. *John Thompson (Design and Contracting Division) Ltd.* [1973] 2 Lloyd's Rep. 40, 41.
(22) *Dass* v. *Masih* [1968] 1 W.L.R. 756.
(23) *H. West & Son Ltd.* v. *Shephard* [1963] 2 All E.R. 625.
(24) *Phillips* v. *South Western Railway Co.* (1879) 4 Q.B.D. 406.
(25) *Mitchell* v. *Mulholland (No. 2)* [1971] 2 W.L.R. 1271, 1276, 1284 & 1286.
(26) *Fletcher* v. *Autocar and Transporters Ltd.* [1968] 2 Q.B. 322; [1968] 1 All E.R. 726.
(27) *Senior* v. *Barker & Allen Ltd.* [1965] 1 All E.R. 818.
(28) *Rowden* v. *Clarke Chapman Co. Ltd.* [1967] 3 All E.R. 608.
(29) *Mallett* v. *McMonagle* [1970] A.C. 166.

FEDERAL COURT.

Khoo Eng Chin (*N. Selvarajah* with him) for the appellant.

P.S. Gill (*Phillip Leong* with him) for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah F.J. (delivering the judgment of the Court): This appeal arose from the decision of the High Court at Ipoh which gave judgment for the plaintiff/respondent and awarded the sum of $2,017,440 in his favour in general and special damages due to the injuries suffered by him and caused by the negligent driving of the defendant/appellant of a motor van AG.7995 which grazed against the respondent's left arm while he was walking along Hugh Low Street, Ipoh at about 7.30 p.m. on March 21, 1971. Prior to the accident the respondent parked his car AG. 613 on the left side of Hugh Low Street, came out and locked the front offside door. After that he walked to the rear of the car with the intention of checking the lock at the boot. As he was walking he saw the van coming from the opposite direction. The next moment he was knocked by the van and fell unconscious. As a result of the accident he suffered injuries as described in detail

in the judgment of the learned Judge. The respondent claimed that as a result of the injuries he was unable to work for two months and for the duration of twenty weeks after that he suffered partial disability. His more serious claim is that his left hand became weak and unsteady after the accident and in spite of regular exercises and physiotherapy treatment the hand still remained weak coupled with tremors. As a result he was unable to carry out operations in plastic surgery for which he claimed to be specially trained.

The appellant in his defence denied that he was in any way negligent in having caused the accident and in the alternative averred that it was contributed to by the negligence of the respondent. He also denied that the respondent had suffered any loss as a result of the accident and the injuries suffered thereby. He alleged that while his van was about to pass the respondent immediately prior to the accident, the respondent raised his elbow up at the same time bending his left hand causing the elbow to jut outward and because of that the van grazed against the respondent's hand. The trial Judge having heard the evidence on both sides concluded that the appellant was solely to blame for having caused the accident and the injuries to the respondent and awarded damages as stated earlier.

There are 14 grounds of appeal as set out in the memorandum of appeal. We propose to deal with these grounds according to their relevant subject-matters.

The first three grounds are whether the trial Judge erred in law and in fact that the appellant was wholly to blame for the accident and that there was no contributory negligence on the part of the respondent.

According to the undisputed facts and confirmed by the sketch plan, the relevant left half of the road (Hugh Low Street) as one faces Anderson Road leads to the junction where there is a traffic light. The width of that part of the road (A-B) is 25 feet 9 inches. Situated to its left is a parking bay (A-H) which is 7 feet 4 inches wide and 19 feet 6 inches long (H-I). On its right run two lanes demarcated by white lines. Along the centre of the road proper is a concrete cement divider. Prior to the accident the appellant was driving the van along the first lane on the left and the respondent was walking from the opposite direction after parking his motor car (K in plan) inside the parking bay (I-H). The width of the car is given as 5 feet 5 inches. The stationary position of the van as shown in the sketch plan (C, D, E & F) is that its nearside front at D is 9 feet 8 inches away from the left edge of the road at A, indicating that it is 2 feet 4 inches away from the side of the parking bay at H. The van had stopped at a slight angle towards the right since its nearside rear wheel at C is 8 feet 6 inches away from the left edge of the road at A. It is closer to A by 1 foot 4 inches.

It was submitted that the respondent's car was probably parked very close to the left hand side of the bay basing on the respondent's admission in cross-examination of having cultivated the habit of parking his car in that manner. There was therefore further space along the offside of the car within the bay (H-I) of approximately 1 foot 3 inches. The van having travelled about 9 feet 6 inches alongside the parking bay and giving allowance for its door handle to be between 2 feet and 2½ feet behind point D, the open space available for the respondent to walk through would be about 2 feet 7 inches. That, however, is an assumption without any supporting evidence. No doubt the appellant stated that the respondent was walking about 6 inches away from the nearside of the van which was about 2½ feet away from the offside of the parked car. However, the learned Judge rejected his evidence that the impact was caused by the respondent on grounds of material discrepancies between his evidence, his pleadings and his police report not to mention the vital contradictions between his evidence and that of the lady passenger seated next to him in the van at the material time (D.W.6) whom the learned Judge treated as an unreliable witness. It should be borne in mind that D.W.6 in her position was nearer to the respondent than the appellant whose full view of the respondent would have been blocked to a certain extent by her. At the material time the appellant had also to concentrate on the road ahead in order to come to a stop in compliance with the traffic light which had turned red. Immediately prior to the impact he had swerved the van to the right and in all probability, to avoid knocking into the respondent. Having regard to the above, we agree with respect with the learned Judge's conclusions that there is no question of contributory negligence on the part of the respondent, that the appellant was wholly to blame for failing to pay attention to the presence of other road users and in consequence thereof failed to allow sufficient space between his van to enable the respondent to pass safely. The learned Judge

applied the correct test in that the appellant had failed to prove that the respondent did not on his own interest take reasonable care of himself and contributed by that want of care to his own injury. [*Lewis* v. *Denye*[1]]. The test for contributory negligence in the case of a pedestrian is not whether he is under a duty of care towards the defendant, but whether he was acting as a reasonable man and with reasonable care. (Per Denning L.J. in *Davies* v. *Swan Motor Co.*[2]).

The next ground is whether the trial Judge erred in law in allowing the amendment in the statement of claim by including the words "... and still continuing on a specified rate to be assessed", at the date of the trial. The application for amendment was made by the learned counsel for the respondent (plaintiff in the Court below) at the commencement of the trial on the grounds that his client was a qualified plastic surgeon and as a result of his injuries he would not be able to continue his practice as one and has to abandon his dream of being a leading plastic surgeon in the country. The application was objected to on several grounds which unfortunately do not appear in the record of proceedings. The learned trial Judge allowed the amendment and thereupon the learned counsel for the appellant unsuccessfully applied for adjournment to enable him to look into the matter which had caught him by surprise and if necessary to take instructions from his client. The latter part does not also appear in the record of proceedings.

The amendment to paragraph (b) under Particulars of special damages reads as follows:–

"(b) Partial loss of earnings for further period of 28 weeks at $300.00 a week *and still continuing on an unspecified rate to be assessed.*" (The emphasis is for the purpose of clarity).

The grounds of objection to the amendment appear to be twofold, viz.:–

(1) The particulars of special damages as they stood covered the period from the date of the accident i.e. 21.3.1967 to the end of October 1967 – a period of 28 weeks. Any loss thereafter would have been known at the date of filing the summons on 6.1.1972. Again for more than 9 years after that no application for amendment of the pleadings was made in spite of the fact that the plaintiff had every opportunity but had failed to do so.

(2) The proposed amendment under special damages does not comply with the requirement of a special damage item in the sense that it is not ascertained as a liquidated sum.

It was further submitted that although the court has a general discretion to allow amendment at any stage of a civil proceeding, the discretion has to be judicially exercised because the amendment would change the whole nature of the claim. The pleading at paragraph (b) as it originally stood was quite precise and complete. The amendment has taken the appellant not only by surprise but defeats the cardinal rule of pleading in civil cases which is meant to avoid such element of surprise. The *bona fides* of this amendment was therefore highly questionable.

It is a well-established principle that special damages in contrast to general damages, have to be specifically pleaded and strictly proved. They are recoverable only where they can be included in the proper measure of damages and are not too remote (see *Halsbury's* Laws of England 4th edition, volume 11 page 218 para 386). That in our view is the cardinal principle adopted by all courts both in England and this country. The same principle was adopted by Ong Hock Thye, F.J. (as he then was) in *Yee Hup Transport & Co. and Anor.* v. *Wong Kong*[3] which was an appeal on quantum of damages. Quoting an excerpt from the judgment of Wilmer L.J. in *Ilkiw* v. *Samuels*[4] he held that the general damages should not be awarded as though they were special damages properly pleaded and proved. Similarly Chang Min Tat, F.J. (as he then was) in *Murtadza bin Mohamed Hassan* v. *Chong Swee Pian*[5] applied the principle in *Ilkiw* v. *Samuels (supra)* that special damages if pleaded as in that case could be recovered. The principle was also adopted by Mohamed Azmi, J. (as he then was) in *Sam Wun Hoong* v. *Kader Ibramshah*[6] in the Federal Court.

The reason that special damages have to be specifically pleaded is to comply with its object which is to crystallise the issue and to enable both parties to prepare for trial (per Edmund Davies, L.J. in *Domsalla* v. *Barr*[7]). In special damages claims the exact loss must be pleaded where the precise amount of item of damages has become clear before the trial either because it has already occurred and so become crystallised or

because it can be measured with complete accuracy (*MacGregor* on Damages 14th edition page 1012 para 1498). The purpose is to put the defendants on their guard and tell them what they have to meet when the case comes on trial (per Cotton, L.J. in *Phillips* v. *Phillips*[8]).

With regard to amending the statement of claim the test applied by the Courts in England in deciding whether to allow such amendment or otherwise proceeds on the principle that the damage suffered by the plaintiff is of a kind that is the necessary and immediate consequence of the wrongful act complained of. In *Perestrello E. Companhia Limitada* v. *United Paint Co., Ltd.*[9] the Court of Appeal refused the plaintiffs leave to amend their statement of claim to include the loss of profits on the ground that damage suffered by them is not the necessary and immediate consequence of the wrongful act complained of.

In *Domsalla* v. *Barr (supra),* it was held, allowing the appeal and dismissing the cross-appeal,

(1) that where it is proposed to allege that there were any special circumstances which would probably lead the plaintiff to sustain in the future losses which would not in the ordinary way reasonably be expected to flow from the accident, those circumstances should be pleaded; that by adverting to the plaintiff's intention to set up in the steel erection business on his own account there was being introduced into the case an entirely new element which had not been adumberated in the statement of claim; and that by so doing the plaintiff was going outside his pleading and objection might properly have been taken to the leading of evidence on that matter.

On page 635 Edmund Davies, L.J. quoted the observations of Lord Donovan in *Perestrello's case:*–

"..... Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case. 'The question to be decided does not depend on words, but is one of substance' (per Bowen, L.J. in *Ratcliffe* v. *Evans*[10])."

Our attention was drawn to the recent cases of *Lim Eng Kay* v. *Jaafar bin Mohd. Said*[11] and *Mat Jusoh bin Daud* v. *Syarikat Jaya Seberang Takir Sdn. Bhd.*[12].

In the first case the court treated pre-trial loss of earnings erroneously pleaded under general damages as a purely technical mistake which did not in any way affect the substance, in the light of evidence sufficiently proved to be real and substantial. There was also the prayer for "any other relief which the Honourable Court deem fit to grant" which considered with the other prayer entitled the court to make such assessment. The trial proceeded without the necessity of making any amendment.

In the latter case a claim for loss of earning capacity under general damages was treated as a pre-trial loss of actual earnings which was sufficiently proved at the trial to an amount exceeding the sum pleaded in the statement of claim but asked for under general damages. The trial court took the view that since the amount of loss was proved by evidence, justice demands that the figure pleaded should be ignored and the effect of such evidence entitled the court to increase the amount. It is to be noted that in both cases the damage suffered appears to be the necessary and immediate consequence of the wrongful act complained of and proved by real and substantial evidence. Be that as it may, we prefer the view that in practice special damages have to be specifically pleaded having regard to prevalent authorities. It requires the plaintiff to plead and particularise any item of damage which represents the out-of-pocket expenses or loss of earnings incurred prior to the trial, and which is capable of substantially the exact calculation. It is commonly referred to as special damages in the sense that fairness to the defendant requires it to be pleaded. (Per Lord Donovan in *Perestrello E. Companhia Limitada* v. *United Paint Co. Ltd. (supra)* and per Lord Goddard in *British Transport Commission* v. *Gourley*[13]). The obligation to particularise is stated in *Mayne and MacGregor* on Damages 12th Edition para 970:–

"Special damage consists in all items of loss which must be specified by (the plaintiff) before they may be proved and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary or useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial."

As stated by Diplock, L.J. in *Ilkiw* v. *Samuels (supra)* on page 1006:–

"..... In my view, it is plain law – so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last one hundred years – that you can recover in an action only special damage which has been pleaded, and, of course, proved. In the present case, evidence was called at the trial the effect of which was that the plaintiff had sustained special damage of a very much larger sum, amounting, I think it would work out at, to something like £2,000 – at any rate, a very much larger sum than £77. This was not pleaded, and no application to amend the statement of claim to plead it could be made because of the agreement already arrived at, at the sum of £77 for special damage. The evidence about the loss of earnings in excess of £77 was admissible, not as proof of special damage (which had not been pleaded) but as a guide to what the future loss of earnings of the plaintiff might be."

Turning to the present case under appeal we agree that paragraph (b) as it originally stood contains sufficient particulars but the amendment lack such particularity as it is pleaded to be still continuing not at the rate of $300 a week as stated in the former but on an unspecified rate to be assessed. We are of the view that this is a departure from the rules of pleading. It is of a different species unconnected with the pleading as it originally stood. It is another matter if the pre-trial loss is based at the rate of $300 a week and still continuing. The respondent would have known of his loss at the date of filing the summons which is more than four years after the accident but after that he allowed more than nine years to lapse before making the application for amendment without showing the appellant the case he has to meet and assisting in computing a payment into court. The amendment includes pre-trial as well as post-trial losses which necessarily require the respondent to specify the loss which he claims and which would have been in his knowledge particularly as to the loss of earnings incurred prior to the trial. A sum of $4,000 has been agreed between the parties for item (b) and no amendment should have been allowed to plead a very much larger sum than that amount and which works out to nearly two million ringgit in special damages. We have no alternative but to conclude that the trial Judge erred in allowing the amendment.

In ground 6 the question is whether the learned Judge rightly concluded that the difference in the medical opinions of the three specialist witnesses is only a matter of degree.

In the case of evidence given by expert witnesses the appellate court should be slow to interfere with the Judge's findings because the trial Judge who has observed the demeanour of the witnesses was in a significantly better position than the appellate court to assess the value of the evidence given. The appellate court will only disturb his conclusion if there are insufficient grounds for his findings or that he has adopted a wrong approach in arriving at that conclusion indicating that he has not taken proper advantage of having seen and heard the witnesses. *(Joyce* v. *Yeomans*[14]).

The evidence on record shows that the learned Judge after considering the evidence of Dr. Sivananthan (P.W.2), Professor Pillay (P.W.3) and Professor Subramaniam (D.W.1) concluded that the opinion of D.W.1 differed only to the degree of disability of the left hand of the respondent. In the final analysis he stated as follows – "It is evident that certain findings are not in dispute. All the three experts were of the opinion that the Plaintiff has suffered a severe injury which caused weakness in the left arm. The important difference in their opinion can be narrowed down to the question of the degree of the disability of the left arm when performing operations."

It was submitted that both Dr. Sivananthan and Professor Pillay (P.W.2 and P.W.3) were of the opinion that the respondent would not be able to perform plastic surgery. Both have examined the respondent on separate occasions and have supplied their written reports and opinions. (Ex. P2 and Ex.P3). In his evidence Dr. Sivananthan said – "If I have such disability .... I would say that I cannot perform surgery involving plastic surgery and microsurgery operation." Similarly Professor Pillay testified "Due to injury the plaintiff is not able to perform delicate surgery" and concluded "..... the injury has caused total disability." On the other hand, Professor Subramaniam (D.W.1) while accepting that the respondent's injury was serious stated that the respondent suffered moderate disability meaning that he could still hold a forcep to carry out an operation which however would take about double the time that would have taken him prior to the injury and agreeing that the respondent might not be able to do certain operations. He said – "The Plaintiff should be able to carry out plastic surgery operation. There is no reason why he should not be able to do so." It is clear therefore that there is a material difference between the opinions of the medical experts who appeared for the respondent and the expert who appeared for the appellant at the trial. The difference is to the usability of the respondent's left arm and not to the degree of usability; the first opinion saying that he cannot perform any plastic surgery

operation at all while the other, that he can perform simple but not major operations. There is no dispute among the experts from their reports that the power grip in the respondent's left hand was much weaker than the right hand. That is due to weakness in the left forearm muscles. The respondent experienced fine tremors in his left wrist and fingers in his left hand when he made an effort to sustain a grip on an object.

As regards the other relevant grounds, it was submitted that the two experts Dr. Sivananthan and Professor Pillay differed in their diagnosis and the cause of the injury. The former said the defect brought by muscular injuries involved the extensor and supriator muscles. The latter was of the opinion that neither the extensor nor the supriator muscles were affected. He went on to say that in some way the posterior interossis nerve which runs in the substance of the supriator muscle, was affected but he was not positive whether the nerve was damaged. He agreed that if a test was conducted on the nerve which controls the muscle, it could give a positive answer but did not think that it was necessary to use nerve conduction tests. He did only a clinical examination and based his opinion on that and the nature of the injury. Dr. Sivananthan also based his opinion on a similar examination apart from reading Dr. Underwood's own report. On the other hand, Professor Subramaniam in the course of examining the respondent also instructed one Professor Loh to conduct an electromyogram/Nerve conduction and EMG test which he said was necessary in order to find out the condition of the nerves. The result of the two tests carried out shows the EMG and nerve conduction velocities were within normal limits. Hence the opinion of Professor Subramaniam based on the objective tests does not support any nerve injury.

It was further submitted that the learned Judge apart from failing to consider the above, also did not bear in mind the fact that the respondent is ambidextrous. The respondent admitted that he was able to cut and stitch with both hands equally well by standing on one side of the patient. Later he found that he could not carry out certain movements with his left hand, and had to change sides and use his right hand. It clearly indicates that he was still able to do plastic surgery. That is borne out by another admission that his hospital which was fully equipped was opened in September 1968 and he was hoping that his condition would improve. However, he was unable to do major surgery after the accident and all he could do was minor operations although he could not hold the forceps with his left hand. There was the evidence of the nurse (P.W.7) that he did carry out minor operations after the accident.

Now, turning to the grounds of judgment, the trial Judge touching on the respondent's evidence said – "He can still perform simple operations such as removing a mole or warts. But he cannot do major plastic surgery." However, he concluded thus:–

> "Having considered the evidence of the three experts, I have no hesitation in accepting the findings of Dr. Sivananthan and Professor Pillay in that the Plaintiff cannot now perform plastic surgery."

Unfortunately he did not stick to that conclusion because after touching on Professor Subramaniam's opinion which he did not think was totally correct and would not accept it without reservations, he further concluded:–

> "In the event I have no doubt that the Plaintiff has suffered permanent disability which was caused by the accident and that now he is not unable to use his hand satisfactorily to perform a major plastic surgery. He has therefore suffered loss and entitled to damages."

He then proceeded to assess damages.

It is glaring that on the one hand the learned Judge accepted the opinions of Dr. Sivananthan and Professor Pillay to the exclusion of that of Professor Subramaniam in that the respondent cannot now perform plastic surgery but surprisingly, he later accepted Professor Subramaniam's opinion that the respondent can do minor plastic surgery. With respect, we have no alternative but to conclude that the learned Judge has failed to make a specific finding of fact on the evidence. It is not clear whether he assessed the damages for loss of earnings on the basis of the respondent's inability to perform major plastic surgery or any form of plastic surgery at all. In our judgment he has not taken proper advantage of having seen and heard the expert witnesses in order to assess the value, reliability and the impressiveness of the evidence on either side to justify his conclusion.

It is to be noted that both Dr. Sivananthan and Professor Pillay stated that the respondent would not be able to perform micro-surgery as well because of his disability. According to the latter the concept of micro-surgery was known about seven to ten years ago and in Singapore,

some time in 1970. He was also of the opinion that there was little problem for a plastic surgeon to progress in micro-surgery. However, in our view, in the absence of evidence that the respondent has performed any micro-surgery before or after the accident, this factor should not be included in assessing any damage for the respondent's loss of earnings. The trial Judge did not appear to touch on the matter in his judgment.

The remaining grounds are whether the trial Judge correctly awarded the pre-trial and post-trial loss of earnings on the strength of the evidence adduced. It was submitted that he was wrong in giving weight to the figures suggested by P.W.2 and P.W.3 as indicative of the earning capacity of a plastic surgeon and that he applied the wrong principle in making the award which is alleged to be manifestly high and excessive in the circumstances.

That the learned Judge relied on the evidence of Dr. Sivananthan (P.W.2) and Professor Pillay (P.W.3) on the probable earning of a plastic surgeon which he concluded in his grounds of judgment to be between $30,000 and $45,000 per month is without doubt. According to Dr. Sivananthan a plastic surgeon would be able to earn between $30,000 and $40,000 a month. He is an orthopaedic surgeon and although he has also done plastic surgery on cases referred to him by the respondent, he admitted that his estimation was only a guess. On the other hand, Professor Pillay (P.W.3) said a plastic surgeon in Singapore should be able to earn a minimum monthly income of $20,000 and $50,000 is quite a usual income. He is also an orthopaedic surgeon having no experience in plastic surgery. His opinion on the matter was not based on personal knowledge and experience but rather on hearsay. It is to be noted that both witnesses were initially called to testify on the injuries and the disabilities suffered by the respondent. The respondent in this regard, thought that he would be able to earn between $30,000 and $45,000 a month if he could carry on plastic surgery. Having regard to the strict proof required of special damages we are of the opinion that the learned Judge should have been more cautious in accepting their evidence. Being experts in their own field of surgery and having based their opinions on guess work and hearsay, it is unsafe to rely on their evidence on the matter. It would not have been difficult to call at least a qualified plastic surgeon to prove that his earnings came to the figure suggested but none was called to testify. Although the two witnesses as stated by the learned Judge are eminent doctors who are doing well in their own field of orthopaedic surgery, they cannot be termed as proper witnesses for the purpose of giving an opinion on the probable income of a plastic surgeon. (See Lord Justice Upjohn in *Lucock* v. *Mildren and Chamberlain*[15]). For that matter even the respondent himself did not say how much he earned for the two major plastic surgery operations which he said he carried out at Assunta Hospital, Kuala Lumpur, prior to the accident. It is true as the learned Judge remarked that the figures suggested by the two witnesses have not been challenged. However, the burden is on the respondent to prove his case by adducing satisfactory evidence. Taking these into consideration, we conclude from the evidence which we have examined, that the figures suggested and accepted by the Judge are too speculative and uncertain to justify acceptance as the probable if not the actual, earnings of a plastic surgeon; *a fortiori* when the learned Judge conceded that they are speculative but still used them to arrive at the average possible income. Thereafter he considered both the awards for pre-trial and post-trial loss under special damages, proceeded to compute and assess the damages accordingly. It is therefore clear that he has not only accepted the probable income without any satisfactory evidence but has also failed to treat the post-trial loss as general damages in accordance with the accepted principle and practice.

In computing the damage under pre-trial loss, he accepted the respondent's income for 1968 as $40,000 and the income on the date of the trial as $72,000. He then divided the latter figure by half and added it with the former, arriving at the figure of $56,000. He said, "This I think should be the average actual income of the plaintiff between 1968 and 1982 i.e. $56,000." Then he continued to compute the respondent's estimated earning capacity at $35,000 per month which he reduced to a median figure of $15,000 after taking into consideration the number of years in which the respondent would require to establish his practice and to catch up before he would really earn that much. He further said, "His income per year would therefore be $180,000. This is his possible earning capacity. This loss of income during the pre-trial period would be ($180,000 – $56,000) = $124,000 per annum. This would work out to $1,798,000/– for 14½ years from 1968 to 1982. From this I would deduct a sum for Income Tax which would be in the 50% bracket. Deduction of Income Tax would be 50% of $1,798,000/– = $899,000/–.

His total estimated pre-trial loss of income would therefore be $899,000/—."

Now, in accepting the sum of $40,000 as the respondent's income for 1968, it was submitted that the learned Judge appeared to have accepted the submission of the learned counsel (see page 77C of the record). However, we do not think that is entirely correct because of the evidence that the income tax returns for 1969 which is his earning for 1968 show the figure of $40,080 which might well be the one accepted by the learned Judge. We note that the income tax returns for the years 1966, 1967 and 1970 till 1979 were tendered in evidence. There were no such returns for 1971 and for 1980 to 1982. No reasons were given for their non-production. For 1982 the respondent stated that his income was $71,000. He explained that the documents prior to 1968 were lost in the flood but subsequent documents would certainly have been available and produced at the trial especially when the respondent had an accountant to look after his accounts. The accident occurred in March, 1967 and the income for that year is available from the tax returns. There was no reason why the Judge had omitted it as the respondent's income immediately after the accident. The other important factor from the above is that except for the low income of $13,447 in 1968 which the respondent said was due to the flood, the rest shows a gradual increase in his income as a general practitioner, the highest being in 1976 which is $77,197.

In this regard, we have in mind *Billingham* v. *Hughes*[16]. This was a case of a 51 year old doctor and radiologist who as a result of being knocked down by an army vehicle, suffered injuries and was unable to continue his practice as a general practitioner. The trial Judge accepted the proposition that he could as a skilled radiologist extend his practice in that branch of his profession and would have more time at his disposal for that purpose. The Judge awarded him £20,000 damages for loss of future earnings on the basis that his total earnings had amounted to £2,000 a year for 15 years less one-third of the resultant sum for contingencies and in consideration of the facts that the plaintiff would receive a large capital sum and might possibly increase his earnings as a radiologist. On appeal the sum was reduced by half on the ground that it was excessive. On page 650 Singleton, L.J. had this to say:—

"... After full and careful consideration, I have reached the conclusion that the sum of £20,000 is much too high. The judge rather assumed that the doctor could make £2,000 a year for fifteen years, that is £30,000, and reduced that figure to £20,000 for reasons which he gave. Having regard to all the facts, and in particular, to the opportunity of increased earnings on the radiology side, in my view the damages on this head should be reduced to the sum of £10,000. It is now clear that Dr. Billingham's loss is not so much as £2,000 a year, as he receives the whole of the fees received from his work as a radiologist, whereas before his accident the fees so received were shared between him and his partner. In 1945, those fees were £591, in 1946 £575, and in 1947 the fees received increased to £1,286. Of course, Dr. Billingham would have more time to give to this work, and consequently the opportunity of earning more from it, after he gave up general medical practice."

Having regard to the above, the learned Judge should have taken into consideration the increase in the respondent's income in his practice as a general practitioner over the years after the accident in computing a fair sum for pre-trial loss.

Turning to the computation by the Judge, he accepted the respondent's evidence of the annual income in 1982 as $72,000. We cannot understand the reason for his adding half of the amount to the 1968 income in order to arrive at the average actual income. We cannot say whether he had in mind the increase in the respondent's income as stated above because he did not give any reason. He then arrived at the figure of $56,000 as the average annual income of the respondent between 1968 and 1982. We notice that the same amount was suggested by the respondent's counsel in his submission as a median figure. With respect we do not think that is the proper method of computation. It would be more appropriate to obtain the total income during the years from the date of the accident till the date of hearing available from the evidence and divide it with the same number of years in order to arrive at the average annual income. Then he accepted the sum of $35,000 as the reasonable monthly income of the respondent as a plastic surgeon and for the reasons stated by him, fixed $15,000 as the respondent's monthly earning capacity. Obviously the $35,000 monthly income was accepted from the sums suggested by P.W.2 and P.W.3. That as we have held earlier cannot be a reasonable and fair estimation and it follows that the figure of $15,000 does not truly reflect the average monthly earnings of the respondent. In fact the Judge has exceeded the amount asked for by the counsel in his submission by almost twice the sum. The latter submitted the figure of $64,000 per annum as pre-trial loss. The Judge awarded $124,000. The respondent pleaded for partial loss of earnings. The Judge allowed the full loss. That was the reason for his

arriving at such a colossal amount of nearly a million ringgit – a sum which we think is inordinately high and manifestly excessive. In the circumstances, the appellate court is duty bound to interfere with the Judge's award. (See *United Plywood and Sawmill Ltd.* v. *Lock Ngan Loi*[17]). The award for post-trial loss which amounts to $1,118,440/– is viewed on similar grounds. The learned Judge has exceeded beyond proportions, by computing the respondent's loss of income at $29,000 per month on the basis of his monthly earning capacity of $35,000 and actual income of $6,000 per month i.e. $72,000 a year. Taking into account all the facts and circumstances of the case and in particular the wrong principle applied in assessing special damages for future loss of earnings, it now becomes the duty of this court to re-examine the evidence which is at large in order to make proper assessment.

Having considered the evidence carefully we are of the opinion even though the respondent might have suffered some loss of earnings because of the accident, the evidence is so unsatisfactory that it is impossible to quantify it. (Per Edmund Davies, L.J. in *Ashcroft* v. *Curtin*[18]). In that case the award for financial loss of the company in which the plaintiff was an active managing director prior to a road accident in which he was seriously injured was reduced to £2,500 under loss of earning capacity on the ground *inter alia* that in the absence of reliable accounts to quantify the loss, it was impossible to support such a claim.

Now, the general principle is that an injured plaintiff is entitled to damages for the loss of earnings and profits which he has suffered by reason of his injuries up to the date of the trial and for the loss of the prospective earnings and profits of which he is likely to be deprived in the future. There must be evidence on which the court can find that the plaintiff will suffer future loss of earnings, it cannot act on mere speculation. If there is no satisfactory evidence of future loss of earnings but the court is satisfied that the plaintiff has suffered a loss of earning capacity, it will award him damages for his loss of capacity as part of the general damages for disability and not as compensation for future loss of earnings (*Ashcroft* v. *Curtin (supra)* and *Rasidin bin Partorjo* v. *Frederick Kiai*[19]). It was applied by Syed Othman F.J. (as he then was) in *Multar* v. *Lim Kim Chet*[20].

There is a difference between loss of future earnings and loss of earning capacity. The important difference between the two is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages. (Per Lord Denning, M.R. in *Fairley* v. *John Thompson (Design and Contracting Division) Ltd.*[21]).

We see the same distinction in the present appeal. There is no indication as to what the respondent's earnings were from his general practice and from his plastic surgery practice to enable us to quantify his loss of income in the latter. Such evidence could have been adduced at least till the end of 1968 when the respondent ceased to practise plastic surgery. The income tax returns merely show his total annual income.

With regard to his practice in major plastic surgery, the respondent appeared to have done two operations at Assunta Hospital, Kuala Lumpur, in the course of five years i.e. between 1962 to 1967. Again there is no evidence of the amount he was paid for the two operations. The situation gives rise to the question whether he has actually performed major operations or has done a reasonable number of such operations to enable him to make a justifiable claim for any loss of income in that respect. In the first place, except for P.W.5 perhaps on whom he tried to do major surgery, the rest according to his own admission and the evidence of his nurse (P.W.7) were all minor operations done under local anaesthetic. The respondent did not have an anaesthetist to perform major operations in his old clinic. No doubt he said he had built a new clinic which was up to date but there is no evidence that the same was available. Apart from that he has and is still carrying on his general medical practice from which his earnings have increased from year to year after the accident.

Secondly, even though the respondent has obtained a Ph.D. in plastic surgery in the University of Tokyo, after a three year course on a Japanese government scholarship sponsored by the Malaysian government, he cannot hold himself out as a specialist in plastic surgery because the degree is not recognised in this country. He resigned from government service before the Specialist Committee could consider him as such after recognising the period of experience he has had in that branch and his expertise. Otherwise he would have had the chance of being recognised as a specialist so long as he remained in the service, on his name being published in the Government Gazette.

Thirdly, as regards the respondent's claim of being posted as a Clinical Specialist in the Plastic Surgery section in the General Hospital, Kuala Lumpur, on his return from Japan, there is contradictory evidence from D.W.5, the Principal Assistant Secretary to the Ministry of Health, who testified by referring to the Ministry's letter (Ex. D9) that the respondent was posted as a medical officer until his resignation and that he was not at any time designated and gazetted as a Clinical Specialist. On being recalled to testify the respondent explained that it was only a verbal directive and his official appointment was as a medical officer. He admitted that the operations he carried out at the General Hospital and the Leper Hospital, Sungei Buloh, were all minor ones which materially contradicts his earlier testimony that he performed major operations.

Fourthly, according to the respondent the degree he obtained in Japan permitted him to practise as a plastic surgeon in Japan and that he had in fact practised in Japan. He had written to one Professor Seiichi Ohmori, one of those who had trained him, seeking clarification as to his qualification because it was not recognised in this country. On the other hand, the appellant's solicitors who had also written to the same Professor, received a reply. An attempt to put the letter in as an exhibit was rejected by the Judge after objection by the respondent's counsel although a copy of the solicitors' letter to the Professor was admitted as Ex. D10. Strangely Ex. D10 has not been included in the record for reasons which we do not propose to discuss. We are now asked to decide on something which is rather vague and the purpose of which cannot be vouched for certainty as to affect the real issue. All we need say is that section 73A of the Evidence Act, 1950 may apply if the Professor's letter contains a statement of facts from his personal knowledge relating to the respondent's qualification and it would be admissible if the Professor's attendance in court could not be secured with reasonable practicability due to his being beyond the seas according to the conditions provided in the section. (Per Lord Denning, M.R. in *Dass* v. *Masih*[22]). In our opinion the fact that the respondent is qualified and has practised plastic surgery in Japan should have been pleaded. The pleading at paragraph 1 of the statement of claim clearly shows that he is a medical practitioner. It is never pleaded anywhere that he is and had carried out practice of plastic surgery as a specialist. Since no objection was raised as regards its admissibility the weight to be given to such evidence should be less having regard to other evidence of the respondent's lack of opportunity and experience in having carried out major plastic surgery.

Fifthly, regarding the fact that he has spent quite a large sum of money to build a modern clinic at Kuala Kangsar with the intention of making it the best in the country, we are of the view that any loss he might have incurred in the building and thereafter the closing of the clinic and in the disposal of the equipment are too remote on the ground that it is a special circumstance which will probably lead him to sustain in the future losses over and above those which in the ordinary way would reasonably be expected to flow from the accident. The special circumstance should be pleaded. (Per Edmund Davies, L.J. in *Domsalla* v. *Barr (supra)*).

For these reasons we conclude that the respondent has not lost any future earnings but has only a diminished earning capacity.

Loss of earning capacity:

Having decided that the respondent has suffered loss of earning capacity which is part of general damages, we are now faced with the difficult task of assessing a fair and reasonable amount for the loss, bearing in mind that a sum of $5,000 has been agreed upon by the parties for pain and suffering. The other elements such as loss of expectation of life and loss of amenities are not prayed for and no evidence was adduced. We have ruled out the element for pre-trial loss of earnings which fall under special damages.

It has to be borne in mind that damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate. *British Transport Commission* v. *Gourley (supra)* and *H. West & Son Ltd.* v. *Shephard*[23]. The award under general damages should be a global sum commensurate with the injury sustained and not a full compensation which might result in ruinous consequences to the defendant. (Per Sir Alexander Cockburn, L.J. in *Phillips* v. *South Western Railway Co.*[24]).

In support of this principle the courts have evolved a particular method for calculating the loss of earning capacity of the plaintiff. The basis is the amount that the plaintiff would have earned in the future and has been prevented from earning by

the injury. This amount is calculated by taking the figure of the plaintiff's annual earnings at the time of the injury less the amount, if any, which he can now earn annually, and multiplying this by the number of years during which the loss of earning power will last, which, if the injury is for the plaintiff's life, will require a calculation of the period of his expectation of working life. This latter figure is generally referred to as the multiplier and the former figure is now coming to be referred to as the multiplicand (see *Mitchell* v. *Mulholland*[25]). The resulting amount must then be scaled down by reason of two considerations, first that a lump sum is being given instead of the various sums over the years and second that contingencies might have arisen to cut off the earnings before the period of disability would otherwise have come to an end. The method adopted by the courts to scale down the basic figure is to take the figure intact of present annual earnings and reduce only the multiplier. The cases where the court adopted this method of assessment are *Phillips* v. *South Western Railway Co. (supra)* and *British Transport Commission* v. *Gourley (supra)* and *Fletcher* v. *Autocar and Transporters Ltd.*[26]. Another method commonly used by the courts in assessing the plaintiff's diminution of earning capacity is to find as a fact (i) for what period, on a balance of chances, earning ability is reduced and (ii) what, on average, the reduction in earnings will be over that period. Cases where the courts made their estimate on this basis are *Senior* v. *Barker & Allen Ltd.*[27]; *Rowden* v. *Clarke Chapman Co. Ltd.*[28] and *Mallett* v. *McMonagle*[29].

The first method is clearly not applicable to the facts of this case since the plaintiff was earning more than what he was earning at the time of the accident. On the other hand, the alternative method would be more appropriate. However, before considering the second method of assessment we would like to set out certain material points. First, the permanent partial disability which the plaintiff was complaining and which was confirmed by the expert medical evidence was that the tremor of the left thumb prevented him from performing major plastic surgery only and the plaintiff had to give up the idea of this branch of medical practice since 1968 or thereabout. Secondly, after stopping plastic surgery practice the earnings of the plaintiff from his medical practice had progressively increased from $13,447/- in 1968 to $40,030/- in 1969, $49,106/- in 1970, $50,000/- in 1971, $47,333/- in 1972, $41,578/- in 1973, $50,749/- in 1974, $53,943/- in 1975, $77,197/- in 1976, $64,764/- in 1977, $76,491/- in 1978, $67,579/- in 1979. There was no evidence of his earnings for the years 1980 and 1981 but in 1982 he stated that his nett annual earnings amounted to $71,000/-. Thirdly, when the plaintiff took out the writ on 6.1.1972 he only claimed (a) 2 months' total loss of earnings at $3,000/- per month, and (b) 20 weeks' partial loss of earnings at $300/- per week, and (c) general damages. However, at the hearing of the case item (a) was agreed at $2,000/- per month, item (b) at $200/- per week for 20 weeks and item (c) at $5,000/- for pain and suffering and loss of amenities only.

Now, applying the principle enunciated in *Ashcroft's case* (see p.2161) and in *Frederick Kiai's* case we hold that in the absence of definite evidence of future loss of earning capacity the court has to arrive at some fair figure. In his statement of claim the plaintiff pleaded that he was suffering from partial loss of earnings for a period of twenty weeks at $300/- per week. At the trial this was reduced by mutual consent to $200/- per week or $800/- per month. We see no valid reason why we could not make use of this as a yardstick to award to the plaintiff damages for his loss of capacity as part of the general damages of his partial disability. Since the plaintiff would now have more time to devote to his general medical practice we would assess an average reduction in earning capacity in the sum of $800/- per month or $9,600/- per year. Having regard to the House of Lords case of *British Transport Commission* v. *Gourley (supra)* we would reduce this sum by 12% for income tax purposes. The net sum after deduction would therefore be $8,448/- or $8,450/- to use a round figure.

The plaintiff was 52 years of age at the date of the trial and we think the useful working life of a major plastic surgeon would be 60 instead of 65 adopted by the learned trial Judge. In other words, there are eight more years to go before the plaintiff reaches the age of 60. This should be discounted for various future contingencies and vissicitudes of life. We would use a multiplier of six for the purpose of this case and this would bring the estimated loss of future earning capacity to $50,700/- or $51,000/-. We would therefore award to the respondent/plaintiff the sum of $51,000/- as part of general damages for estimated loss of future earning capacity. This sum does not include the $5,000/- already awarded for pain and suffering which has been agreed upon by the parties. The

respondent is therefore entitled to $56,000/- as a fair and reasonable award under general damages. In the result the award of $1,118,440/- for post-trial loss of earnings is set aside.

As regards special damages the award of $899,000/- for pre-trial loss of earnings is set aside. The award of (a) $4,000 for loss of earnings for two months, (b) $4,000 for partial loss of earnings for 20 weeks at $200 per week and (c) $200 for damage to wrist watch, all of which have been agreed upon by the parties, are hereby confirmed.

The present awards are as follows:-

General damages:

(a)	For pain and suffering	$5,000
(b)	Loss of earning capacity	$51,000
	Total	$56,000

Special damages:

(a)	Loss of earnings for 2 months at $2,000 per month	$4,000
(b)	Partial loss of earnings for 20 weeks at $200 per week	$4,000
(c)	Damage to wrist watch	$200
	Total	$8,200

Interest:

With regard to interest, in view of the long delay in which this case came up for trial, there will be 6% interest on general damages from the date of service of the writ instead of 8% as awarded and 3% interest on special damages from the date of the accident instead of 4%. It should be borne in mind that unnecessary delay in the disposal of cases of this nature tends to increase the amount of interest. We will like to remind counsel of their duty to secure early trials so that this can be avoided.

The appeal is hereby allowed. With regard to costs we order that the appellant is entitled to his taxed costs in this appeal and that the respondent is entitled to his taxed costs in the court below. The deposit is to be refunded to the appellant.

Appeal allowed.

Solicitors: *Kean Chye & Sivalingam; Cheang Lee & Ong.*

DATUK DR. MURUGASU SOCKALINGAM & ANOR. v. SUPERINTENDENT OF LANDS AND SURVEYS, FIRST DIVISION, SARAWAK

[F.C. (Raja Azlan Shah L.P., Lee Hun Hoe C.J. (Borneo) & Abdoolcader F.J.) May 10 & July 29, 1983]

[Kuching – Federal Court Civil Appeal No. 50 of 1983]

Land law – Land Acquisition – Appeal against award – Injurious affection – Sarawak Land Code (Cap. 81), s. 60.

In this case the appellants appealed against the award by the learned judge in respect of land acquired by the Sarawak Government for the extension of the Sarawak Airport. The learned judge upheld the award of the Superintendent of $30,000.00 per acre for Lot 331 and $25,000.00 per acre for the portion from Lot 614. In addition he awarded 5% for injurious affection under section 60(1)(c) of the Land Code in respect of Lot 614.

Held: (1) the learned judge had gone very carefully into the various sales referred to by the valuers and had correctly upheld the award by the Superintendent;

(2) the learned judge was correct in rejecting the substantial claim for diminution of value due to severance and injurious affection as he correctly stressed that despite the severance, the potentially of the remaining portion of the land did not seen to have been affected; the learned judge had exercised his discretion judicially and had not acted wrongly in awarding $13,175.00 for injurious affection.

Cases referred to:

(1) *Superintendent of Lands and Surveys, Sarawak* v. *Aik Hoe & Co. Ltd.* [1966] 1 M.L.J. 243, 246.

(2) *Superintendent of Lands and Surveys, First Division* v. *Chin Fah Siong,* Sarawak Civil Appeal No. 3 of 1959.

(3) *Khoo Peng Loong & Brs.* v. *Superintendent of Lands and Surveys, Third Division* [1966] 2 M.L.J. 156, 158.

(4) *Gajanan Vinayak* v. *Assistant Collector* A.I.R. 1924 Bom 54, 55.

FEDERAL COURT.

Mathew Chan for the appellants.

Abdul Razak Tready, Legal Adviser, Lands and Surveys Department, Kuching for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): This is an appeal against the award made by the learned Judge in respect of the land acquired by the Sarawak Government for the extension of the Kuching airport.

In 1950 Datuk Dr. Murugasu Sockalingam owned Parcel 16 Block 233 Kuching North Land District, 6½ Mile Penrissen Road, Kuching. In